Principles of Public Law

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FREEDOM OF ASSEMBLY AND ASSOCIATION

25.1 Introduction

Like freedom of speech, the right of individuals to gather together to express their views is an important democratic safeguard, since criticism of those in power (whether justified or not) can be made much more forcibly by 20 people than by one lone voice. As with freedom of speech, the protection extends to non-political debate and protests against the actions of private parties, such as an anti-vivisection vigil held outside a private laboratory. As a vehicle for political discussion, public assemblies provide generally the only opportunity to people who are not members of the media to make a point, either about law reform or about government policy generally, when they feel that other avenues (such as the electoral process) have been closed off to them. The law on public order should, arguably, recognise that peaceful demonstrations sometimes prove ineffective and it should, thus, be open to citizens to make their point forcibly, even disruptively. If lying in front of a bulldozer is the only way to prevent a motorway being built through a green belt area, it may (in some circumstances) be inappropriate to prosecute the protester. However, because this kind of 'direct action' threatens the rights and freedoms of others, the law tends to accord more protection to public order than to public protest.

Freedom of association entails the right to belong to organised groups, political or otherwise. Writing about the importance of associations in a civil society in the early 19th century, the French political theorist Alexis de Tocqueville observed that:

> ... no countries need association more – to prevent either despotism of parties or the arbitrary role of the prince – than those with a democratic social State ... In countries where such associations do not exist, if private people did not artificially and temporarily create something like them, I see no other dike to hold back tyranny of whatever sort, and a great nation might with impunity be oppressed by some tiny fraction or by a single man [*Democracy in America*, 1994, New York: Fontana, p 192].

The two rights of assembly and association are said to be mutually dependent, since effective protest in groups (assembly) sometimes depends upon those groups having legal status and some sort of a structure (association). The two are closely related to freedom of speech, at least in their instrumental value to a democracy, of keeping open the channels of dissent (see Barendt, E, *Freedom of Speech*, 1985, Oxford: Clarendon, pp 280–98). The right to freedom of

association also extends to the right to form and join trades unions. However, a discussion on trades union rights (which have been much legislated and litigated) is outside the scope of this book and the following sections will focus on two main issues: the right to assemble and the right to join organised groups, including political parties and pressure groups.

As with all the rights and freedoms discussed in Part D of this book, assembly was only a residual freedom (until the Human Rights Act 1998 came into force). Dicey's perception of this level of protection was that it was more than adequate:

> ... the right of assembling is nothing more than a result of the view taken by the courts as to individual liberty of person and individual liberty of speech [*An Introduction to the Study of the Law of the Constitution*, 10th edn, 1959, London: Macmillan, p 271].

As the following sections will illustrate, however, the inroads made by the common law and legislation have considerably reduced the residual protection of the right to assemble. This is because we cannot dissociate the notion of public protest from the concept of public order. Conor Gearty describes this as the 'schizophrenia that afflicts the treatment of the subject by both politicians and members of the public. The law manifests the same confusion, being rooted simultaneously in two opposites' (Gearty, C, 'Freedom of assembly and public order', in McCrudden, C and Chambers, G (eds), *Individual Rights and the Law in Britain*, 1993, Oxford: Clarendon, p 39). This schizophrenia is, however, the inevitable consequence of the particular nature of the right to protest, involving as it does the occasional interference with the rights of movement and even the privacy and speech of others. Feldman has pointed out that whereas most rights, such as the freedom from arbitrary arrest or interference with privacy, require mere restraint on the part of others, the right to assemble and protest:

> ... require (if they are to be effectively used) some form of communication with others, and so presuppose that the freedom of other people from annoyance is to be restricted at least so far as necessary to allow the protester to impart the nature of the protest and invite people to join in protest or discussion. It therefore goes beyond pure liberalism, which would permit people and groups to buy or hire a private hall to ventilate their grievances or policies ... but would not allow them to force their opinions on non-consenting adults [Feldman, D, *Civil Liberties and Human Rights in England and Wales*, 1993, Oxford: Clarendon, p 784].

Another threat to the freedom of assembly is posed by Community law, since the expression of public opposition to certain areas of trade interferes with the freedom of movement of goods, fundamental to the EC Treaty. The cases discussed below, in 25.7, ask whether we should accept that there is an EC right to free transport of property which should always override the right to demonstrate.

The following sections will look at the various common law, legislative and Community law inroads into the right of assembly and association and assess them for their conformity with Art 11 of the ECHR, which provides as follows:

1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, or the police, or of the administration of the State.

25.2 Breach of the peace

'Breach of the peace' is an ill defined and ancient concept which triggers the exercise of police powers in many areas, particularly in the context of public order (see the discussion of *McLeod v UK* (1999), above, 23.2.2). The police can take preventative measures against an *apprehended* breach of the peace. It does not take much imagination, therefore, to conjure up a range of controversial issues which, when aired in public, will create a risk that the peace will be breached in some way or another. The present law is that the requirement of reasonable apprehension of breach of the peace will be satisfied 'whenever harm is actually done or is likely to be done to a person ... or where a person is in fear of being so harmed ...' (*R v Howell* (1982)).

Difficult questions of responsibility arise where such meetings are likely to breach the peace because of the intervention of rowdy opposition. The common law position on this used to be quite liberal: the authorities could not prevent a meeting on these grounds, otherwise, private groups would have powers of censorship over the lawful expression of opinion of others (*Beatty v Gilbanks* (1882)). The principle in *Beatty v Gilbanks* was undermined in a number of later cases where the likelihood of a violent response provided grounds for preventative action on breach of peace grounds. In 1963, a speaker in Trafalgar Square expressed extreme right wing views to an assembled crowd, including a number of Communists and Jewish people. When violence broke out in response to his more provocative statements, the defendant was arrested and prosecuted for public order offences, even though he himself had not engaged in the acts of violence himself. The court considered that, in such situations, a speaker 'must take his audience as he finds them' (*Jordan v Burgoyne* (1963)). This case can be distinguished from *Beatty v Gillbanks*, in that the plaintiffs in the first case were conducting a peaceful procession to

disseminate the message of the Salvation Army; the disorder was caused by their opponents, the 'Skeleton Army'. In *Jordan*, on the other hand, the plaintiff himself had insulted the audience, thereby provoking a response. The principle in *Beatty* has been revived by the House of Lords in *Brutus v Cozens* (see below, 25.7.4); the current state of the law is that, provided the behaviour of the speaker or protester himself is not 'insulting', the adverse reaction of the audience should not provide grounds for a public order action against him. In *Nicol and Selvanayagam v DPP* (1996), the Court of Appeal said that breach of the peace would not be found where the violence provoked was wholly unreasonable; so, if all the defendant is doing is exercising his or her basic rights, 'whether of assembly, demonstration or free speech', any violent response would be considered unreasonable and the breach of the peace would not be laid at the speaker's door.

This ruling is consistent with Strasbourg jurisprudence on the right to assemble under Art 11, which may be limited 'in the interests of disorder or crime'. The problem of violent opposition to an otherwise peaceful protest was addressed by the Court in *Platform Ärzte für das Leben v Austria* (1991). An association of doctors campaigning against abortion in order to secure changes in Austrian legislation complained that the failure by the police to control violent counter-demonstrations violated their free assembly rights under Art 11. On the facts, the Court decided that the Austrian authorities had taken sufficient measures to protect the exercise of this right; but the Court did stipulate that:

> Genuine, effective freedom of peaceful assembly cannot ... be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Art 11 ... Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.

Such positive measures are limited in English law. Fragmentary protection is given to lawful meetings under statute law: s 1 of the Public Meeting Act 1908 makes it is a criminal offence to act in a disorderly fashion at an otherwise lawful public meeting with the intention of breaking up that meeting and, if a meeting is organised on private premises, it is lawful to employ stewards to preserve order (s 2(6) of the Public Order Act 1936). There is, in addition, the offence of 'aggravated trespass' which criminalises the obstruction of lawful activities that are taking place on 'land in the open air' (s 68 of the Criminal Justice and Public Order Act 1994). Since this provision was aimed specifically at hunt saboteurs, it is rarely relied upon to shift the burden of responsibility for breach of the peace from the holder of a lawful assembly to the rowdy opposition.

25.3 Binding over orders

Magistrates have the power to bind over any person appearing before them under the Magistrates' Courts Act 1980, under common law and under the Justices of the Peace Act 1361. This means that magistrates may order someone to undertake to 'keep the peace or be of good behaviour' on pain of forfeiting a certain sum of money if it is found that they have been acting in an anti-social fashion. If the person thus bound over refuses to enter into this undertaking, or 'recognisance', the court may impose a sentence of imprisonment for up to six months. A binding over order can be imposed even if the breach of peace has not yet occurred – in other words, criminal sanctions may be applied to non-criminal behaviour. For this reason, these common law and statutory powers have been challenged under the ECHR. In *Steel v UK* (1999), various environmental protestors who had been imprisoned for their refusal to be bound over claimed violation of their rights to liberty, fair trial, freedom of expression and freedom to protest under the ECHR (Arts 5, 6, 10 and 11). In particular, they argued that the custodial sentence for refusing to be bound over fell short of the requirements of Art 5. The Court rejected the Art 5 claim, observing that breach of the peace was an offence in English law and that the applicants could have foreseen that their refusal to keep the peace would be followed by a custodial sentence. As far as the claim under Art 10 was concerned, the Court agreed with the State's arguments that the arrests and detention were permissible infringements of some of the applicants' freedom of expression in preventing disorder and in protecting the rights of others under Art 10(2), and the detention following the applicants' refusal to be bound over was an infringement of this freedom justified by the need to maintain the authority of the judiciary. Other applicants whose mode of protest had been, in the Court's view, less disruptive, succeeded in their Art 10 argument; handing out leaflets outside a nuclear power plant was a form of expression that was unjustifiably suppressed by the short prison sentence that followed. Since it had reached this decision under Art 10(2), it did not consider the equivalent exception in Art 11(2). This decision indicates that challenges under the ECHR to the binding over jurisdiction of magistrates are unlikely to succeed before national courts.

25.4 Obstruction of the highway

This offence has been codified in s 137 of the Highways Act 1980 and is arrestable without warrant, which means that, if the police suspect that this offence is being or is about to be committed, they can order the meeting to move off and, if those in charge of the assembly fail to comply with police instructions, they can be prosecuted for obstructing a constable in the execution of his duty under the Police and Criminal Evidence Act 1984 (*Arrowsmith v Jenkins* (1963)). The activity must be conducted in such a manner that there is no 'lawful excuse' for it; the test for this is whether the activity is

reasonable or not. The handing out of leaflets by animal rights protesters in a shopping centre outside a furrier's store was not considered unreasonable and convictions for s 137 offences were overturned: *Hirst and Agu v Chief Constable of West Yorkshire* (1985). Protest about matters of public concern can, therefore, sometimes constitute a 'lawful excuse', although this very much depends upon the magistrate's perception of what constitutes a matter of public concern.

25.5 Nuisance actions

People using the highway for assemblies or processions run the risk of being prosecuted for the offence of public nuisance or being sued in private nuisance. The offence of public nuisance is committed when the 'public' suffer a disturbance or interference with the rights they enjoy in common with others as a result of the unlawful activities of others. Private nuisance, unlike public nuisance, is a civil wrong and is actionable only when a private individual has suffered particular damage beyond the general inconvenience suffered by the public. However, the activities giving rise to the nuisance need not be unlawful; they simply have to be unreasonable. Private nuisance actions are based on property rights and the concept that you should be allowed peaceful enjoyment of your property free from interference by others. The activities of a small group of protesters handing out leaflets outside an estate agent on Islington High Street were stopped by the successful application for an injunction by the estate agent owners in a nuisance action (*Hubbard v Pitt* (1976)), because the applicants satisfied the court that 'unreasonableness' was established by showing that passage outside their office was obstructed. This decision has been much criticised and the dissenting opinion of Lord Denning MR was cited with approval in a recent case on trespassory assemblies, *DPP v Jones* (1999) (see below, 25.7.3). Lord Denning observed that the plaintiffs had not made out a *prima facie* case of private nuisance against the protestors; their real grievance was not the alleged obstruction (which only went on for three hours on Saturday mornings), but the words on the placards and the leaflets which they claimed were defamatory of them.

25.6 Trespass and private property

Despite its name, the 'public highway' is not the property of the public at all; most roads belong to local authorities and the use of them is limited to passing and re-passing and activities incidental thereto. Other popular sites open to the public have different owners; London parks, for instance, belong to the Crown and activities that take place within them are subject to bylaws. The use of the streets leading to Parliament is subject to the powers of the Metropolitan Police Commissioner, under the Metropolitan Police Act 1839, to

make directions regarding the passage of traffic during parliamentary sessions.

Since there is now a specific statutory power under the Public Order Act 1986 available to the police to prohibit 'trespassory assemblies' on land to which the public has 'limited access' (see below, 25.7) it is important to know what constitutes 'activities incidental to the use of the highway'. The matter came up for consideration in the House of Lords in *DPP v Jones*, where the majority found that there was no hardcore meaning to this test and that 'very little activity could accurately be described as "ancillary to passing along the highway"' and that peaceful, non-obstructive assembly could not be regarded as unlawful for simply being non-incidental to passing and repassing. On the general point, Lord Hutton observed that:

> ... if ... the common law recognises the right of public assembly, I consider that the common law should also recognise that in some circumstances this right can be exercised on the highway, provided that it does not obstruct the passage of other citizens, because otherwise the value of the right of public assembly is greatly diminished.

Private obligations to recognise assembly

There are some statutory and common law restrictions on the right of property owners to prevent the exercise of freedom of expression or assembly on their land. We have seen an example of one of these restrictions in the *Hirst* decision, where the court's finding that the activities of animal rights protesters were not unreasonable was fatal to the obstruction offence charged. Contractual obligations may override property considerations in this context; if a local council has entered into a binding agreement with an association to allow a meeting on their land, a newly constituted council of a different political persuasion cannot renege on that agreement on the basis of the unpopularity of the hiring organisation. In *Verral v Great Yarmouth Borough Council* (1981), the Court of Appeal held that the Council had to go ahead with a conference booking by the National Front. Universities are bound by statute to allow free speech within their precincts (Education (No 2) Act 1986). The way this obligation has been interpreted and applied over the years has been somewhat relaxed; in general, universities are permitted to impose substantial conditions on a meeting which is likely to be controversial. In *R v University of Liverpool ex p Caesar-Gordon* (1991), a case concerning the proposed address by a member of the South African Embassy in an area with a largely ethnic population, the Divisional Court upheld the conditions imposed on the meeting, including the ban on publicity, the requirement of proof of identity and the reservation of the right to charge the Conservative Association, who organised the meeting, the cost of security. In practice, then, the ability to impose these kinds of conditions, particularly the last one, makes it difficult for less well endowed organisations to provide a university platform for controversial speakers.

25.7 The Public Order Act 1986

This Act was introduced to provide a legal basis for the State's regulation of assemblies and processions. Before this legislation was passed, many of the police powers in this context relied on the common law for their legitimacy.

25.7.1 Processions

Processions are governed by s 11 of the Act. The police can require previous notice of processions to be given six days before a procession is due to take place, if it is likely to cause public disorder or damage to property or disruption to the community. Once notice is given, conditions may be imposed under s 12 which effectively undermine the purpose of the demonstration. If the authorities are satisfied that such conditions will not prevent serious disorder under s 13, they can arrange for *all* processions in any given area to be prohibited for 30 days. Such a blanket ban would seem to be a disproportionate measure under Art 11(2). However, since the European Court of Human Rights ruled in *Ärzte für das Leben* that States are under a positive obligation to legislate in order to protect those exercising their right to peaceful assembly from violent opposition, it is easier for governments to satisfy the Court that restrictive measures, such as prior authorisation, geographical conditions and limitations in numbers, are justifiable as part of this duty. Indeed, in *Christians Against Racism and Fascism v UK* (1980), the Commission rejected as 'manifestly ill-founded' a claim that a blanket ban on processions that were likely to provoke violent disorder from opponents was a breach of Art 11. The general ban, issued because of possible violent counter-demonstrations, was deemed to fall within the exceptions to the general freedom, laid down in para 2, particularly since there seemed no less restrictive alternative to avoid the trouble. The applicants themselves did not present any threat to public order, although the Court accepted the respondent State's argument that conflicts between the National Front and their opponents had taken place before, and the applicants, being one of the opponents, might well trigger another disruption. In *Friedl v Austria* (1995), the dispersal of a sit-in, following the evidence of disruption to passers by, was also accepted as being for the 'prevention of disorder'. These precedents render it less likely that the powers of the police to ban processions that threaten 'public disorder' under the Public Order Act 1986 might be challenged for incompatibility with Art 11 of the ECHR.

Special problems arise in respect to processions and sectarian marches in Northern Ireland. The government has attempted to address this by passing the Public Processions (Northern Ireland) Act 1998 which created a Parades Commission to monitor public processions and 'other expressions of cultural identity', giving the Commission broad powers to impose conditions on any proposed procession. The Secretary of State may ban the procession altogether

if it threatens public disorder or disruption to the life of the community. These two conditions are similar to the powers under the Public Order Act 1986. But additional criteria are included in the Northern Ireland Act, reflecting the extreme sensitivity of processions in that part of the UK. A ban may be imposed by the Secretary of State, if, in addition, he takes into account the 'impact of the procession on relationships in the community', or 'demands on the police or military forces', and comes to the conclusion that these cannot be satisfied by anything less than a total prohibition on the march. In July 1998, a ban was imposed on a Protestant march which was planned through a Catholic enclave of the Northern Irish town of Portadown. Marches staged by members of the Protestant Orange Order commemorate historic British victories over the Irish and, given the sensitivity of the area, the authorities feared that such a demonstration would spark off enough violence to bring down the fragile peace process in Northern Ireland. The response to this ban was a wave of unrest and a series of protest marches staged by the Orange Order through Belfast and other towns and villages. Troops were called in to control the rioting and outbreaks of violence while the stand-off between the authorities and the organisers of the march continued over weeks. This incident demonstrates that legislative controls do not always provide a solution to the public order problems posed by political demonstrations. On 5 July 1999, fears of a similar outbreak of violence were abated when the Orangemen of Portadown prepared their annual march at Drumcree Hill. The security services prepared to stop the marchers from passing through the town's nationalist areas by constructing a formidable line of fortifications. In the event, these measures were not needed; the march was peaceful. These events underline the importance of the approach taken to policing itself, as opposed to the use of formal powers in seeking to prevent disorder.

25.7.2 Assemblies

The police have the same powers to impose conditions on the holding of assemblies to be held in the open air as they have in respect of processions. They can also ban a particular assembly altogether under s 14A, provided they apprehend 'serious damage to property' or 'serious disruption to the life of the community' (s 14 of the Public Order Act). Their powers in relation to assemblies can only be applied to meetings of 20 or more people in public places. Once the police have imposed conditions, either in writing before the procession or assembly or by oral instructions at the scene, failure to follow them will amount to an offence punishable by three months in prison.

25.7.3 Trespassory assemblies

Section 14A of the Public Order Act 1986 allows the police to apply for consent from the Secretary of State to impose a ban on trespassory assemblies, the definition of which has been considered in *DPP v Jones* (1999). A group of New

Age travellers had gathered on a part of the highway next to Stonehenge where there was a s 14A order in force. The police then arrested two travellers for obstruction when they failed to disperse and they were convicted for breaching the order. The Divisional Court ruled that the holding of a meeting, however peaceable, on the highway, has nothing to do with the right of passage and, therefore, could constitute a trespassory assembly contrary to s 14B(2) of the Act. On appeal to the House of Lords, this ruling was overturned. The limitation of the lawful use of the highway to activities incidental to passing and re-passing would render unlawful 'such ordinary and useful activities as making a sketch, taking a photograph, handing out leaflets, collecting money for charity, singing carols, playing in a Salvation Army band, children playing a game on the pavement, having a picnic or reading a book' (*per* Lord Irvine), and this would place an 'unrealistic and unwarranted restriction on commonplace day to day activities'. It will be remembered (see above, 25.4) that 'reasonable use' of the highway exonerates the user from criminal liability for wilful obstruction. In *DPP v Jones*, the Lords noted that it was undesirable in theory and practice for activities on the highway not to count as breaches of the criminal law, yet to count as trespasses. This judgment was handed down before the passing into force of the Human Rights Act 1998, but it is influenced by ECHR principles. As Lord Irvine pointed out, if an assembly on the public highway was always trespassory, 'then there is not even a *prima facie* right to assembly on the public highway in our law. Unless the common law recognises that assembly on the public highway may be lawful, the right contained in Art 11(1) of the Convention is denied'.

25.7.4 Disorderly behaviour

The line between peaceful protest and disorderly behaviour has been drawn by the offences of riot, affray and threatening, insulting and abusive conduct codified in ss 1–5 of the Public Order Act 1986. The offences which concern us are those where lawful assembly risks becoming unlawful by virtue of random types of behaviour which are very widely drawn in the Act.

Section 4 makes the use of 'threatening, abusive or insulting' words or behaviour, or the use of visible representations of that nature, an offence if it is intended to cause or is causing an apprehension of immediate unlawful violence. There is no special meaning to be attached to the words 'insulting' or 'abusive' and they do not cover 'innocuous conduct which happens to draw a violent response' (*Brutus v Cozens* (1973)). An unexpected spin was put on this provision when a group of Muslim fundamentalists relied on it in an attempt to obtain a summons against the publishers of Salman Rushdie's controversial novel *The Satanic Verses* (*R v Horseferry Road Magistrates ex p Siadatan* (1991)). They said the book was deeply offensive to many Muslims and the violence it had already provoked indicated that the publishers were continuing to commit a s 4 offence by not withdrawing the edition from sale. The

application was unsuccessful; the court ruled that the violence that was to be provoked had to be immediate, although this was to include a relatively short period of time within which violence would be likely to erupt.

Section 5 is a much wider offence than s 4. It covers insulting or threatening and abusive conduct which is likely to cause alarm, harassment or distress to anyone in hearing range. Unlike s 4, intention is not necessary. The force of many protest messages depends on the use of distressing images; the use of images of aborted foetuses, in a pro-life protest, was, therefore, not said to amount to a s 5 offence, if the protesters genuinely did not intend them to be so (*DPP v Clark* (1991)). Police constables are included in the group of people who are likely to be caused 'alarm, harassment or distress' (*DPP v Orum* (1988)) and the alarm need not be confined to the prospect of danger to oneself; it could extend to fear of danger to a third party (*Lodge v DPP* (1988), where the apprehension of danger was to the offender himself, who was gesticulating in the traffic).

25.7.5 Harassment

The Prevention of Harassment Act 1997 creates a new hazard for unwitting protesters. Under this Act, it is an offence to pursue a course of conduct amounting to 'harassment' (undefined by the Act) which may cause alarm or distress. Although this Act was designed to cover the activities of 'stalkers', it has recently been used in an application for an injunction against the British Union for the Abolition of Vivisection, restraining it from harassing a company which uses animals for research purposes. However, the High Court rejected the application, saying that Parliament had clearly not intended the Act to be used to prevent individuals from exercising their right to protest and demonstrate about issues of public interest (*Huntingdon Life Sciences Ltd v Curtin* (1997)). Whilst the offence of harassment may certainly be committed once peaceful protest has deteriorated in such a way as to interfere with the freedoms of others, it is to be hoped that future courts will take a restrictive approach to the application of the offence in the public order context.

25.7 Freedom of assembly versus free movement of goods

There have been two Community law decisions which dealt peripherally with the issue of freedom of assembly, both involving claims under the freedom of movement provisions in the EC Treaty. In *R v Chief Constable of Sussex ex p International Trader's Ferry Ltd* (1998), a cross channel livestock transporter challenged a decision by the police to reduce the level of cover provided to ferry services against animal rights demonstrators. The Chief Constable had been concerned that the financial and manpower resources committed to policing the port area were interfering with the efficient policing of the county

generally. By reducing the level of policing, the applicants claimed, the police had effectively created an obstacle to the movement of goods across borders in breach of Art 30 (now 29) of the EC Treaty. The House of Lords ruled that, even if the Chief Constable had been in breach of this Article, his decision could be justified on the ground of public policy, permitted by the Treaty, since he was trying to make the best use of limited resources available. The Lords distinguished this case from an earlier judgment by the Court of Justice which involved similar facts. In Case C-265/95 *Commission v France* (1997), the Commission sought a declaration that France had failed in its free movement obligations by failing to control the actions of French farmers who, over the years, had committed acts of vandalism against the imports of agricultural goods from other signatory States. It was alleged that the French authorities had been reluctant to intervene when incidents arose and failed to prosecute the perpetrators. The Court of Justice granted the declaration, holding that France, by not taking adequate steps to prevent farmers from committing or repeating offences, had failed to adopt all appropriate and necessary measures to ensure the free movement on its territory of goods originating from other signatory States as required by the EC Treaty.

Although the implications of the Court of Justice's decision in *Commission v France* have yet to be felt, one major concern that arises out of the case is that Member States will be concerned to avoid an enforcement action by the Commission and an adverse ruling by the Court of Justice in any situation where demonstrations threaten to interfere with the free movement of goods on their territory. In a sense, this judgment will legitimise draconian State action against such demonstrations. Whilst Art 11 does not, and should not, entail an unrestricted right to impede the free flow of trade and goods across borders, the distance that many EU citizens perceive to exist between their wishes and the EU legislative process makes it particularly significant that the democratic importance of freedom of assembly should be given its due weight when it comes into conflict with Community freedoms.

25.8 Restrictions on the freedom of association

Until recently, the European Court of Justice's case law on the Art 11 right to freedom of association outside the sphere of trades union legislation has been rather sparse. In fact, most of the case law on freedom of association concerns individuals' rights *not* to be compelled to join certain associations (*Young, James and Webster v UK* (1982), confirmed by the ruling that Art 11 confers negative freedom of association in *Sigurjonsson v Iceland* (1993)). There have been some judgments in relation to employment law. In *Vogt v Germany* (1996), the European Court of Human Rights held that a teacher who had been dismissed from her post because she belonged to an extreme left wing group had suffered a violation of her free speech rights under Art 10, as well as her association rights under Art 11.

The Convention guarantees the freedom to join pressure groups and other voluntary organisations and, in a recent judgment (*Socialist Party and Others v Turkey* (1998)), the European Court of Human Rights ruled that the dissolution of the United Communist Party of Turkey was a violation of Art 11. This judgment, in effect, brings political parties within the scope of Art 11, on the basis that such organisations are forms of association essential to the proper functioning of democracy. It did not accept that the message put out by the party leader (that a federal system should be established in which Kurds would have an equal footing to Turks) amounted to a call for the use of violence. Since no connection could be found between the terrorist situation in Turkey and the statements made by the party leader, the Court found that the dissolution of the party was disproportionate to the aim of national security and could not, as such, be said to be a measure which was 'necessary in a democratic society'. A few weeks later, the Court considered a similar issue in a case concerning a political association in the Greek administrative region of Macedonia. The question here was whether the applicants' Art 11 rights had been breached by the refusal of the authorities to register an association called 'The Home of Macedonian Civilisation', because it was felt that the real aim of the association was to promote the idea that there was a Macedonian minority in Greece, undermining Greece's national integrity, contrary to Greek law. The Court held that this amounted to an interference with the applicants' exercise of their right to freedom of association, since one of the most important aspects of that freedom was that citizens should be able to form a legal entity in order to act collectively in a field of mutual interest. Whilst the authority's aims – the protection of national security and the prevention of disorder – were legitimate, the refusal of registration, based on unproven suspicions about the association's motives, was held to be disproportionate to these aims (*Sidiropoulos and Others v Greece* (1998)).

The right to join political associations is often decided under Art 10 rather than Art 11, the rationale for this being that expression is one of the objectives of freedom of association. In *Ahmed v UK* (1998), the applicants, local government officers who took active roles in local politics, challenged regulations which restricted the political activities of certain categories of local government officers. Under the regulations, which had been passed to maintain local government political impartiality, the applicants had been obliged to resign from their respective political parties and cease canvassing for election. The European Court of Human Rights rejected their claim that this was a disproportionate interference with their rights under Arts 10 and 11, holding that the regulations were justified by the pressing social need to strengthen the tradition of political neutrality.

There is, in addition to the 'clawback' provisions of para 2 of Arts 10 and 11, a more general restriction in the ECHR on political associations. Article 17 allows States to impose restrictions on programmes pursued by those groups, to prevent them interfering with the rights protected elsewhere in the ECHR.

Strasbourg case law on the scope of Art 17 indicates that it may be relied upon by respondent governments to justify restrictions on a number of ECHR rights, particularly Art 11, although it should be a last resort (*Purcell v Ireland* (1991)) and the Court is generally reluctant to allow respondent States to rely on it: see the discussion of *Lehideux v France* (see above, 24.5). The specific question has not yet arisen, but it is possible that most anti-terrorist legislation in this country would come under the protective umbrella of Art 17 as well as being justified by the Art 11(2) exceptions. The Prevention of Terrorism (Temporary Provisions) Act 1989 prohibits membership of a number of proscribed organisations in Northern Ireland, irrespective of whether those organisations have indulged in terrorist activities or not (the organisations currently proscribed under the PTA are the IRA and INLA). The other main restriction on political associations is to be found in the Public Order Act 1936, which makes it an offence to form an organisation which is 'organised or equipped entirely for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object or in such a manner as to arouse reasonable apprehension that they are organised or equipped for that purpose' (s 2(1)(b)).

The Public Order Act 1986 criminalises the wearing of uniforms by participants in public gatherings. The offence is only committed if the uniform is so worn as to signify the wearer's association with any political organisation. Section 1 was introduced in response to the use of uniforms by Fascist groups between the two World Wars; now, it is of relevance largely in the context of political activities by the IRA and Unionist groups (*O'Moran v DPP*; *Whelan v DPP* (1975)). The Act also prohibits the gathering of vigilantes in quasi-military groups (s 2). The prevention of terrorism legislation extends these prohibitions to proscribed organisations in Northern Ireland: it is an offence to wear any item which arouses a reasonable apprehension that a person is a member or supporter of any of those organisations.

25.9 Assessment

Sections 11, 13, 14 and 14A of the Public Order Act 1986 are in most urgent need of reform. The problem rests not so much in the specific restrictions laid down by the legislative wording but the broad margin of discretion left to the police in determining whether any particular public act is likely to lead to certain consequences which, in turn, give them authority to prevent that act from taking place or impose sanctions when it does (see the criticisms of this legislation by Bonne, D and Stone, R, 'The Public Order Act 1986: steps in the wrong direction?' [1987] PL 202; and Smith, ATH, 'The Public Order Act 1986: Part I' [1987] Crim LR 156). It has been seen, from the foregoing pages, that bans may be imposed on assemblies if there is a risk of serious disruption to the life of the community. What constitutes 'serious' disruption or, indeed, who precisely makes up 'the community' and what kind of 'life' it is that risks

disruption are all questions that are very much left to the discretion of the authorities. Such bans may amount to infringements on the right to assemble that extend beyond those permitted under Art 11(2), such as the prevention of disorder and crime (see Fitzpatrick, B and Naylor, M, 'Trespassers might be prosecuted' (1998) 3 EHRLR 292). Authorities should only be permitted to impose blanket bans on processions and trespassory assemblies if there are no alternative methods of preventing apprehended disorder. Although it is possible, in principle, to challenge the imposition of a blanket ban by way of judicial review, precedents show that this is unlikely to be successful in practice, In *Kent v Metropolitan Police Commissioner* (1981), the CND attempted to challenge a blanket ban which had caused it to cancel a number of planned marches. But it conceded that any demonstration, whatever the purpose, would have led to disorder and, therefore, the Divisional Court refused an order to quash the ban, since the applicant had not been able to establish that there had been no reasons for imposing it in the first place. If the burden of justifying the ban were on the authorities, rather than the burden of arguing for its removal remaining on those wishing to proceed with a peaceful protest, the temptation to impose automatic blanket bans would be much reduced.

Since very little land in the UK is truly 'public' and thus available as a platform for public protest, the widening of permissible uses of quasi-public spaces such as the highway in *DPP v Jones* is a welcome and timely development, at least as far as the public law on trespassory assembly is concerned. There are still shortcomings, however, in the private law of nuisance, which is still firmly associated with property interests (*Hunter v Canary Wharf* (1996)) and the tendency of the courts to favour the rights of landowners suggest that they are likely to give significant weight to the countervailing interest in protecting the 'rights and freedoms of others' under Art 11(2) (an assessment of the restrictions on public protest in non-public places can be found in Robertson, G, *Freedom, the Individual and the Law*, 7th edn, 1993, London: Penguin, pp 66–68). One of the most significant restrictions to freedom of expression in modern Britain is traffic control: anything which interrupts the flow of traffic is fair game for a banning order (see the discussion in Klug, F, Starmer, K and Weir, S, *The Three Pillars of Liberty*, 1996, London: Routledge, p 198, on the failure of the Campaign Against Arms Trade to find anywhere to release their slogan bearing balloons). As roads are built, extended and widened, we can see that the residual protection of certain liberties which may have been regarded adequate in Victorian England cannot be relied upon to protect public protest against practical obstacles like this.

The common law on breach of the peace is also ripe for reform, even though the European Court of Human Rights has considered that this wide concept – which does not, in itself, amount to an offence – is sufficiently certain and ascertainable to rank as a restriction 'prescribed by law'. Nevertheless, national case law demonstrates that a finding of potential breach of the peace can have a significant chilling effect on lawful public

protest. Given the current precedents on breach of the peace, it may be that only the House of Lords has sufficient authority and flexibility to change the law in this area.

FREEDOM OF ASSEMBLY AND ASSOCIATION

Freedom of assembly is an important democratic freedom because, like freedom of expression, it provides a platform for open criticism of those in power. Sometimes, protest interferes with the rights of others and, in order to make freedom of assembly an effective right, it is necessary to take measures to legitimise this interference. Freedom to associate entails the right to belong to organised groups, political or otherwise. Article 11 protects the right to freedom of assembly and association, subject to a number of exceptions, notably the rights and freedoms of others and the prevention of disorder. In addition, there are various other statutory and common law restrictions on these rights.

Breach of the peace

The police may take steps to prevent an apprehended breach of the peace. Those exercising their rights to lawful protest will not be liable for breach of the peace where the violence they may have provoked is entirely unreasonable. The standard of reasonable apprehension of breach of the peace will be satisfied whenever harm is actually done or is likely to be done or where a person is in fear of being harmed.

Binding over orders

Magistrates have common law and statutory power to bind people over to keep the peace. Such measures have been found to be compatible with Art 11(2).

Obstruction of the highway

People exercising their rights of assembly on the highway may be charged with the offence of obstruction if their use of the highway is considered to be unreasonable.

Nuisance

Participators in assemblies and processions may be liable for the offence of public nuisance if the public are disturbed by their unlawful activities; they

may also be sued in private nuisance if their activities interfere with the lawful enjoyment of land adjoining their protest site.

Trespass

Trespass actions may be taken in respect of many 'public' places which are not in fact public at all. Even the 'public highway' does not belong to the public and the use of the highway is limited to passing and re-passing and activities incidental to that. Private landowners may prevent meetings taking place on their land. But universities are under a statutory obligation to permit free speech within their premises.

The Public Order Act

There are a number of limitations on processions and assemblies under this Act. The police may impose conditions if the proposed procession is likely to lead to certain disruptive consequences and a blanket ban on all processions may be imposed if a serious breach of the peace is predicted. A ban may also be imposed on trespassory assemblies, and the present position is that an assembly will not be 'trespassory' if the use of the highway by its participants is considered 'reasonable'. The Public Order Act also creates a number of offences for random types of disorderly behaviour which may turn a lawful assembly or protest into an unlawful one. Such behaviour is an offence if it is 'insulting, threatening or abusive'.

Freedom of assembly versus free movement of goods

The European Court of Justice has recently ruled that the failure by a Member State to take positive measures to prevent protests that interfered with the free movement of goods was a breach of EC law. This judgment may be relied upon by State governments to justify draconian measures against protesters in areas involving Community law.

Restrictions on freedom of association

The European Court of Human Rights has recently ruled that the dissolution of a political party was an unlawful infringement of this right and could not be justified on the basis of the party leader's message advocating constitutional change – this did not amount to a call to violence. A number of statutory provisions, such as the anti-terrorist legislation and the Public Order Act 1936, prohibit or restrict association with certain types of proscribed organisations.